Rochester Regional Joint Board Local 14A *and* Xerox Corporation and Jones Lang Lasalle Americas, Inc. Cases 03–CC–137244 and 03–CE–137252

April 29, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On April 28, 2015, Administrative Law Judge Lauren Esposito issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

The issue before us is whether to adopt the judge's finding that the Respondent, Rochester Regional Joint Board Local 14A, violated Section 8(e) of the Act by entering into a collective-bargaining agreement with the Charging Party, Xerox Corporation (Xerox), containing a certain "Successorship" provision. That provision, which defined "Transfer of Business" as "the transfer by sale, lease or otherwise of ownership of or operational control over a significant portion of the Company's current production functions or facilities," prohibited Xerox from making such transfers unless the transferee assumed the obligations of the collective-bargaining agreement. The judge found that this was an unlawful union signatory clause. In so finding, the judge interpreted the provision to impermissibly require any "lessee" of Xerox to assume the obligations of the parties' collective-bargaining agreement.

As explained below, we do not agree with the judge's interpretation of the "Successorship" provision. Accordingly, we reverse the judge's finding of an 8(e) violation and dismiss this complaint allegation.

Facts

Xerox is engaged in the manufacture and sale of office equipment worldwide. The events in this case involve Xerox's office and place of business in Webster, Monroe County, New York. For many years, the Respondent and Xerox have been parties to a collective-bargaining agreement (Agreement) covering Xerox's Monroe County production and maintenance employees. The most recent agreement is effective from June 2, 2014, through June 1, 2018.

Article XXII of the Agreement is entitled "Successorship" and has been in the parties' collective-bargaining agreements in its current form since 1989. In relevant part, it states:

A. DEFINITIONS

> 1. Transfer of Business shall mean the transfer by sale, lease or otherwise of ownership of or operational control over a significant portion of the Company's current production functions or facilities in Monroe County, New York to any other individual, partnership or corporation provided, however such term shall not include any such transfer, sale or lease, in whole or in part, which forms part of one or more financing transactions by the Company where the Company retains operational control of the assets transferred, sold or leased.

[…]

B. NOTICE AND REGULATIONS

> 1. There shall be no Transfer of Business unless at least sixty (60) days prior to the effective date of such Transfer of Business the Company has delivered to the Manager of the Rochester Joint Board a binding written commitment by the Transferee to assume all of the Company's obligations under this Agreement. In addition, the Company agrees that during said sixty (60) day period immediately preceding such a transfer, it shall meet at reasonable times, for the purpose of negotiating with the Union all issues concerning the effects of the Company's decision to transfer its operations.

A separate section of the Agreement, Article II, B, addresses subcontracting.

[1] There were no exceptions to the judge's finding that the Respondent violated Sec. 8(b)(4)(ii)(A) and (B) of the Act by attempting to restrict and enjoin the Charging Party's subcontracting to Jones Lang LaSalle Americas, Inc. (JLL) by seeking to enforce Article XXII of the parties' collective-bargaining agreement through the grievance procedure and through Federal litigation. We reject the Respondent's contention, made for the first time in its reply brief, that it did not waive its right to challenge the judge's 8(b)(4)(ii)(A) and (B) findings. See Sec. 102.46(g) of the Board's Rules and Regulations (matter not timely raised in exceptions or cross-exceptions cannot thereafter be argued to the Board).

[2] We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

Jones Lang LaSalle Americas, Inc. (JLL), a national commercial real estate services provider, entered into a contract with Xerox effective November 1, 2012, pursuant to which JLL manages and administers Xerox's real estate in the United States and Canada. In 2014,[3] JLL contracted with Xerox to provide additional services, including HVAC maintenance, cleaning, moving, docks, and ancillary services, at the Webster, New York facility. When Xerox notified the Respondent that it intended to subcontract these additional services to JLL, the Respondent replied that the subcontracting would, inter alia, violate Article XXII and, accordingly, requested that Xerox provide it with a written assurance that JLL would honor the Agreement. When Xerox did not acquiesce, the Respondent filed several grievances, one of which alleged that Xerox violated Article XXII by transferring "operational control over the maintenance functions" at Xerox's Monroe County facilities without complying with the requirements of Article XXII.[4] The Respondent also initiated a civil action and filed a petition for a preliminary injunction in Case No. 6:14-CV-6607 in the United States District Court for the Western District of New York, seeking to enjoin Xerox's additional subcontracting to JLL until its grievance was arbitrated. The General Counsel then issued the instant complaint alleging, inter alia, that the Respondent violated Section 8(e) of the Act by entering into and maintaining Article XXII of the Agreement because it requires lessees doing business with Xerox to assume the obligations of the Agreement.[5]

Judge's Decision

The judge concluded that Article XXII was facially unlawful. As noted above, Article XXII states that there shall be no transfer of business unless the transferee agrees to assume the obligations of the Agreement. The judge's finding was primarily based on her interpretation of the language in Article XXII defining a transfer of business as "the transfer by sale, lease or otherwise of ownership of or operational control over a significant portion of the Company's current production functions or facilities." The judge read this language to mean that any lease is a transfer of business subject to the requirements of the provision, and, therefore concluded that Article XXII unambiguously "has the effect of prohibiting Xerox from doing business with any potential lessee which refuses to be bound by the [Agreement]."[6] Having determined that Article XXII applied to "any potential lessee," the judge concluded that Article XXII was effectively a "union signatory clause" in clear violation of Section 8(e).[7]

Discussion

For the reasons stated below, we reverse the judge and find that Article XXII does not restrict Xerox's right to enter into any lease with a secondary employer. Rather, we find that Article XXII is a lawful successorship provision that by its express terms is limited to "transfers of ownership . . . or operational control" and is therefore not prohibited by Section 8(e) of the Act.

Section 8(e), which was enacted to protect genuinely neutral employers and their employees, essentially prohibits unions from disrupting an employer's daily business with neutral employers.[8] By its terms, Section 8(e) establishes that it is an unfair labor practice for an employer and union to enter into an agreement under which the employer will "cease doing business" with another employer.[9] Thus, Section 8(e) proscribes contract claus-

[3] All dates are in 2014 unless otherwise indicated.

[4] The Respondent's other grievances alleged that Xerox violated the subcontracting provision of the parties' Agreement by subcontracting exempt work.

[5] In addition, the General Counsel filed a petition for preliminary injunction to enjoin the Union from enforcing Article XXII by pursuing its grievance and compelling arbitration, and filing a lawsuit. On November 17, the United States District Court for the Western District of New York granted the petition and entered an order enjoining and restraining the Union from attempting to enforce Article XXII against Xerox and JLL's subcontracting arrangement pending the final disposition of the instant case before the Board. *Rochester Regional Joint Board, Local 14A*, 59 F.Supp.3d 565 (W.D.N.Y 2014).

[6] The judge relied on rules of construction described in *Teamsters Local 982 (J. K. Barker Trucking Co.)*, 181 NLRB 515, 517 (1970) (finding that if the meaning of a clause is clear, the Board will determine its validity under Sec. 8(e); where the clause is not clearly unlawful on its face, the Board will interpret it to require no more than what is allowed by law, and if the clause is ambiguous, the Board will not presume unlawfulness, but will consider extrinsic evidence to determine the parties' intent), affd. 450 F.2d 1322 (D.C. Cir. 1971).

[7] The judge relied on numerous decisions finding that lease agreements requiring lessees to assume the obligations of a collective-bargaining agreement violated Sec. 8(e). E.g., *Hotel & Restaurant Employees Local 274 (Sheraton University Hotel)*, 326 NLRB 1058, 1059 (1998) (clause requiring any lessee or concessionaire of hotel to be bound by collective-bargaining agreement violated Sec. 8(e)); *Chicago Dining Room Employees Local 42 (Gaslight Club)*, 248 NLRB 604 (1980); *Hotel & Restaurant Employees Local 531 (Verdugo Hills Bowl)*, 237 NLRB 1204 (1978), enfd. 623 F.2d 61 (9th Cir. 1980). The judge further found that, even if Article XXII were ambiguous, the extrinsic evidence surrounding the parties' negotiations shows that the Union intended for Article XXII to operate as a union signatory clause.

[8] *Operating Engineers, Local 701* (*Cascade Employers Assoc.)*, 221 NLRB 751, 752 (1975).

[9] Sec. 8(e) reads in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into hereto-

es that require certain business transactions, such as subcontracting, or, as alleged here, leasing, be limited to employers who are signatories to union contracts—so-called union signatory clauses. Such clauses are not viewed as protecting the wages and job opportunities of unit employees, but rather as a means of furthering general union objectives and attempting to regulate the labor policies of other employers.[10]

The Board and courts have long held, however, that "doing business" within the meaning of Section 8(e) does not include the sale or transfer of a business.[11] The Board has reasoned that a transfer or sale of a business does not disrupt the employer's daily conduct of its business with a neutral employer, but rather constitutes "a substitution of one entity for the other while the conduct of business continues without interruption."[12] Accordingly, the Board has found that contract provisions requiring a successor employer to assume the obligations of a collective-bargaining agreement do not violate Section 8(e).[13]

Here, the judge correctly recognized the legal distinction between contract clauses that impermissibly seek to prevent a signatory employer from doing business with other companies (e.g. by limiting its leasing or subcontracting to companies signatory to the union's agreement), and clauses that lawfully limit a signatory employer's permanent transfer of its business (e.g., by sale or transfer) to companies that agree to be bound to the employer's obligations under its collective-bargaining agreement. We disagree, however, with the judge's application of these principles to the language of Article XXII. The judge isolated the term "lease" from the operative language in the provision, including the phrase "transfer by sale, lease or otherwise of ownership of or operational control," and interpreted Article XXII to apply to leases and subcontracts in violation of 8(e). (Supra, fn. 7.) A plain reading of Article XII does not support this interpretation. Article XXII states that a "Transfer of Business shall mean the transfer by sale, lease or otherwise *of ownership of or operational control*" over production functions or facilities and that such transfers "*shall not include any such transfer . . . where the Company retains operational control of the assets* transferred, sold or leased" (emphasis added). Thus, the provision plainly defines "transfer of business" to mean transfers of "ownership or operational control" where Xerox retains no operational control of the transferred work or facilities.

Furthermore, the terms "sale, lease or otherwise" do not themselves define transfers of business for purposes of 8(e). Nor, as the judge implied, are they examples of transactions that are categorically subject to Article XXII's requirements. Rather, these terms indicate only that Article XXII's definition of a transfer of business applies regardless of the specific name attached to a transaction (i.e., whether parties call it a "sale, lease or otherwise"). See *NLRB v. Hotel & Restaurant Employees Local 531 (Verdugo Hills Bowl)*, 623 F.2d at 66. There, in construing a provision restricting leasing to signatory employers, the court observed that "title of a transaction should not determine the applicability of section 8(e) and . . . a clear articulation of the doing business requirement is needed." Id. Thus, the Board in *Verdugo Hills Bowl* had analyzed a lease agreement between a bowling alley and an on-premises coffee shop and found that it constituted "doing business" under Section 8(e) because no permanent transfer of business took place and the employer retained an interest in the coffee shop and placed several restrictions on its use. Id. at 1207. In the present case, the plain language of Article XXII provides that it is only triggered by a transfer of the business notwithstanding that "lease" is referenced in the clause. Contrary to the judge's reading of the provision, should Xerox lease part of its business, Article XXII would place no restrictions on the lessee *unless* there was a transfer of ownership or operations and Xerox retained no operational control over the transferred functions or facilities.[14]

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fore or hereafter containing such an agreement shall be to such extent unenforceable and void.

[10] See *Verdugo Hills Bowl*, 237 NLRB at 1206.

[11] See *Cascade Employers Assoc.,* 221 NLRB at 752*;* see also *Mine Workers of America (Lone Star Steel Co.)*, 231 NLRB 573 (1977), enfd. in rel. part 639 F.2d 545, 550 fn. 12 (10th Cir. 1980); *Teamsters Local 814 (Bader Brothers Warehouses)*, 225 NLRB 609, 609 fn. 1, 614–615 (1976); *Machinists Local No. 71 (Harris Truck & Trailer Sales)*, 224 NLRB 100, 103 (1976) (sale of physical assets does not constitute "doing business" under Sec. 8(e)).

[12] *Cascade Employers Assoc.*, 221 NLRB at 752.

[13] See *Bader Bros. Warehouses,* above (finding lawful a successorship clause that required a lessee to assume the obligations of the parties' bargaining agreement in the event of a transfer of an entire business operation or part thereof); *Cascade Employers Assoc.*, 221 NLRB at 752. See also *Painters Local 970 v. NLRB*, 309 F.3d 1, 7 (D.C. Cir. 2002) (lawful successorship clause would only take effect when "Employer's business is, in whole or in part transferred to another entity") (internal quotation marks omitted), denying enf. *W.R. Mollohan*, 333 NLRB 1339 (2001).

[14] As noted, the Respondent did not except to the judge's finding that its effort to apply Article XXII to enjoin the subcontracting to JLL violated Sec. 8(b)(4)(ii)(A) and (B), and therefore we express no view on that finding. Nevertheless, we observe that such a finding would not establish a Sec. 8(e) violation. "*Solely unilateral* conduct by a union . . . to enforce an unlawful interpretation of a facially lawful contract clause [such as Article XXII] does not violate Sec. 8(e) because such conduct does not constitute an 'agreement.'" *Sheet Metal Workers Local 27 (AeroSonics),* 321 NLRB 540, 540 fn. 3 (1996) (emphasis in original), and cases cited therein.

The cases that the judge relied on to find that leases implicate "doing business" within the meaning of Section 8(e) are distinguishable. Unlike Article XXII, the provisions in those cases, like those discussed above, were clearly aimed at leases that would constitute "doing business" under Section 8(e). For example, in *Sheraton University Hotel*, 326 NLRB at 1058, the Board affirmed the judge's finding that the challenged successor provision violated Section 8(e) because it impermissibly extended beyond the sale or transfer of the business to expressly apply to "*any* lessee or concessionaire," thereby prohibiting the hotel "from doing business with such potential lessee or concessionaire who refused to be bound by that agreement." (Emphasis added.) As such, this was "a typical 'union signatory clause' not limited in its effect simply to preserving bargaining unit jobs." Id. In addition, in *Gaslight Club*, 248 NLRB at 607, the Board found that a lease agreement violated Section 8(e) where it required any employer who leased part of the employer's premises where unit employees performed work to agree to the terms of the existing contract "whether or not those unit employees lose their jobs." Because the provision explicitly applied to nonsuccessors, the Board found that the provision exceeded "the legitimate primary purpose of protecting unit work" and was "directed at the secondary purpose of furthering general union objectives." Id.[15]

Accordingly, we find that Article XXII is a lawful successorship clause that does not implicate "doing business" within the meaning of Section 8(e) of the Act.[16]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Rochester Regional Joint Board Local 14A, Rochester, New York, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and reletter the subsequent paragraphs.

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. April 29, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

[15] We disagree with the judge's statement that the Board has categorically held (or could hold) that assumption-of-contract provisions implicating lessees and subcontractors violate Sec. 8(e). Regardless of title, the question remains whether the transfer serves a lawful work preservation objective. See, e.g., *Bader Brothers Warehouses*, 225 NLRB 609, 609 fn. 2 (rejecting any inference that subcontracting restrictions are outside the scope of a lawful work preservation objective); *Harter Tomato Products*, 321 NLRB 127 (1996) (lessee of a tomato paste plant is a successor because it used the same employees to make the same product).

[16] As noted above, the judge found that, even if Article XXII were ambiguous, the extrinsic evidence surrounding the parties' negotiations shows that the Union intended for Article XXII to operate as a union signatory clause. We note, however, that the extrinsic evidence confirms instead that the parties "entered into" a successorship clause that was meant to ensure only that a *purchaser* of the business would assume the obligations of the Agreement. This evidence included the initial proposal requiring adherence to the Agreement "from any new owner of Xerox or a significant portion of the company"; testimony that Article XXII was meant to require that "whoever bought the company would have to honor the contract"; a Union newsletter stating that the provision was "a guarantee that the new contract will be honored even if Xerox were to be sold"; and bargaining notes of the Union's negotiator stating that Article XXII's purpose was to protect the bargaining-unit employees and their jobs. The parties also included an effects-bargaining clause at Section B of Article XXII requiring bargaining over "the effects of the Company's decision to transfer its operations," which further indicates that the provision was intended to address transfers where another employer substitutes for Xerox as a new owner or operator of the business.

WE WILL NOT threaten, coerce, or restrain Xerox Corp. by filing grievances, or initiating civil actions, where the object is to force or require Xerox Corp. to enter into an agreement which violates Section 8(e) of the Act.

WE WILL NOT threaten, coerce, or restrain Xerox Corp. by filing grievances, or initiating civil actions, where an object thereof is to force Xerox Corp. to cease doing business with Jones Lang LaSalle Americas, Inc., or any other person.

WE WILL withdraw the September 21, 2014 grievance alleging that Xerox Corp.'s subcontracting to Jones Lang LaSalle Americas, Inc. violated Article XXII of the collective bargaining, and notify Xerox that the grievance has been withdrawn.

WE WILL seek dismissal of civil action 6L140CV-6607 in the United States District Court for the Western District of New York filed on October 27, 2014, and motion for a preliminary injunction to enjoin Xerox Corp. from subcontracting to Jones Lang LaSalle Americas, Inc. until the September 21, 2014 grievance is arbitrated.

ROCHESTER REGIONAL JOINT BOARD LOCAL 14A

The Board's decision can be found at www.nlrb.gov/case/03-CC-137244 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT enter into, maintain, enforce, or give effect to those portions of article XXII of our collective-bargaining agreement with Xerox Corp. which require that any lessee or concessionaire assume the collective-bargaining agreement.

WE WILL NOT threaten, coerce or restrain Xerox Corp. by filing grievances, or initiating civil actions, where the object is to force or require Xerox Corp. to enter into an agreement which violates Section 8(e) of the Act.

WE WILL NOT threaten, coerce or restrain Xerox Corp. by filing grievances, or initiating civil actions, where an object thereof is to force Xerox Corp. to cease doing business with Jones Lang LaSalle Americas, Inc., or any other person.

WE WILL withdraw the September 21, 2014 grievance alleging that Xerox Corp.'s subcontracting to Jones Lang LaSalle Americas, Inc. violated article XXII of the collective-bargaining, and notify Xerox that the grievance has been withdrawn.

WE WILL seek dismissal of civil action 6L140CV-6607 in the United States District Court for the Western District of New York filed on October 27, 2014, and motion for a preliminary injunction to enjoin Xerox Corp. from subcontracting to Jones Lang LaSalle Americas, Inc. until the September 21, 2014 grievance is arbitrated.

ROCHESTER REGIONAL JOINT BOARD, LOCAL 14A

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/03-CC-137244 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Alicia Pender, Esq. and *Jesse Feuerstein, Esq.,* for the General Counsel.

Michael T. Harren, Esq. and *Joseph A. Gawlowicz, Esq. (Trevett Cristo Salzer & Andolino, P.C.),* of Rochester, New York, for the Respondent.

Michael A. Hausknecht, Esq. (Nixon Peabody, LLP), of Rochester, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAUREN ESPOSITO, Administrative Law Judge. Based upon the charges in Cases 03–CC–137244 and 03–CE–137252, filed on September 23, 2014, and amended on October 8, 2014, by Xerox Corporation (Xerox), an amended consolidated complaint and notice of hearing (the complaint) issued on October

29, 2014. The complaint alleges that Rochester Regional Joint Board Local 14A (the Joint Board or the Union) violated Section 8(e) of the National Labor Relations Act (the Act) by entering into and maintaining an agreement in which Xerox has agreed not to do business with any other employer or person. The complaint further alleges that the Joint Board violated Section 8(b)(4)(ii)(A) and (B) of the Act by repeatedly taking the position that subcontracting was prohibited by the agreement violating Section 8(e) of the Act, and by filing a grievance and a lawsuit seeking to enforce the unlawful agreement. This case was tried before me on November 12 and 13, 2014, in Buffalo, New York.[1]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the arguments of the parties made at trial and in their posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material to the complaint's allegations, Xerox has been a corporation, with an office and place of business in Webster, New York, and has been engaged in the manufacture and sale of office equipment and related supplies. The Joint Board admits and I find that Xerox has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and admits that the Union has been a labor organization within the meaning of Section 2(5) of the Act. The Joint Board admitted at the hearing and I find that at all material times, Jones Lang Lasalle Americas, Inc. (JLL) has been a corporation, with a principal place of business in Chicago, Illinois, engaged in providing commercial real estate services at various locations in the United States, and that Xerox and JLL have been parties to an agreement whereby JLL manages and administers Xerox's real estate in the United States and Canada (Tr. 7–8).

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Union's Representatives and the Collective-Bargaining Relationship

For many years, the Joint Board and Xerox have been parties to a collective-bargaining agreement applicable to Xerox's employees in Monroe County, New York, in various production and maintenance job classifications. At all material times, Gary Bonadonna was the Joint Board's chief principal officer, and Roger LaDue was its business representative; the Joint Board admits and I find that Bonadonna and LaDue were its agents within the meaning of Section 2(13) of the Act. Bonadonna and LaDue testified at the hearing.

The most recent collective-bargaining agreement is effective by its terms from June 2, 2014, through June 1, 2018. According to Bonadonna, negotiations for this agreement took place in May 2014, and did not involve any proposed subcontracting or changes to existing contract language addressing that issue. Article II(B) of the collective-bargaining agreement is entitled "Subcontracting," and provides in pertinent part:

> 1. The Union recognizes the Company's right to determine what work is done within the jurisdiction of the bargaining unit and what work is to be subcontracted, outsourced, vended or placed in other Xerox facilities.
>
> 2. The parties further recognize that such decisions will be subject to changing business conditions and will be ongoing.
>
> 3. The Company further agrees that any and all decisions to subcontract, outsource, vend or relocate work performed by the bargaining unit will only be reached after full disclosure, in advance, with the Union leadership. Such meetings will be called as needed and will provide the Union with all relevant facts, to include the impact of such action on the bargaining unit.
>
> . . . .
>
> 5. It is understood that all Project work, exceeding twelve (12) to fifteen (15) hours for the total project, shall be outsourced; however, at the end of six (6) months, and periodically thereafter, the Parties will review all Project work that has been outsourced and any adjustments that may be required, and will be made based on factual data and operating needs. However, it is understood, between the Parties, that the "Coverage" work, designed to maintain and support our manufacturing and building operations, will take priority. It is further understood that there will be no outsourcing of Coverage work, with the exception of work which requires a skill and/or equipment capability that does not exist within Maintenance. Further, the Parties agree that for Project work, not exceeding twelve (12) to fifteen (15) hours, "time constraints", as well as skill and/or equipment capability, may also be a factor contributing to outsourcing decisions; however, there will be a strong preference for keeping the work in house. The Parties agree that any and all "First Right of Refusal", "Contractual Overtime Obligations" and "Staffing Percentage" agreements, due to vending or transferring work, either externally or internally, shall be eliminated.

(Jt. Exh. 2, p. 2–3.)

The collective-bargaining agreement also contains a provision at article XXII entitled "Successorship," which states as follows:

> A. DEFINITIONS
>
> 1. Transfer of Business shall mean the transfer by sale, lease or otherwise of ownership of or operational control over a significant portion of the Company's current production functions or facilities in Monroe County, New York to any other individual, partnership or corporation provid-

[1] On October 16, 2014, Rhonda P. Ley, the Regional Director of Region 3, National Labor Relations Board, filed a petition pursuant to Sec. 10(l) of the Act for a preliminary injunction against the Joint Board. On November 17, 2014, the United States District Court for the Western District of New York, Judge Elizabeth A. Wolford, granted the Petition and entered an order enjoining and restraining the Joint Board from giving force and effect to art. XXII of its collective-bargaining agreement with Xerox, or threatening to enforce art. XXII through arbitration or a lawsuit with the object of forcing Xerox to cease doing business with Jones Lang Lasalle Americas, Inc., pending the final disposition of the instant case before the Board.

> ed, however such term shall not include any such transfer, sale or lease, in whole or in part, which forms part of one or more financing transactions by the Company where the Company retains operational control of the assets transferred, sold or leased.
>
> 2. Transferee shall mean any individual, partnership or corporation to which the Company shall make a Transfer of Business.
>
> B. NOTICE AND REGULATIONS
>
> 1. There shall be no Transfer of Business unless at least sixty {60) days prior to the effective date of such Transfer of Business the Company has delivered to the Manager of the Rochester Joint Board a binding written commitment by the Transferee to assume all of the Company's obligations under this Agreement. In addition, the Company agrees that during said sixty (60) day period immediately preceding such a transfer, it shall meet at reasonable times, for the purpose of negotiating with the Union all issues concerning the effects of the Company's decision to transfer its operations.
>
> C. TERM OF ASSUMED CONTRACT
>
> 1. If on the effective date of a Transfer of Business, this Agreement shall be within less than two years of its expiration date, then the expiration date of this Agreement shall be automatically extended to such later date as shall be two years after such effective date. All dates for notice of termination or modification shall be adjusted accordingly.
>
> 2. The Parties acknowledge that the Union's right to have this Agreement assumed by the Transferee prior to the Transfer of Business is essential to the Union's responsibility to represent its members. The Parties further acknowledge that the Union will suffer irreparable injury if notice is not given or if the contract is not assumed as provided in this Article.

(Jt. Exh. 2, p. 47.) Article XXII was initially negotiated into the parties' collective-bargaining agreement in 1989, and has been included since then in unchanged form (Tr. 139; Jt. Exhs. 1, 2).

At all material times, Linda Kelly was Xerox's manager of corporate labor relations (Tr. 19). Dave Nappi was Xerox's vice president of property management for the 6 years prior to August 20, 2014, when he became JLL's director of regional facilities for Xerox's facility in Webster, New York (Tr. 46). Kelly and Nappi both testified at the hearing.

B. The Subcontracting of Bargaining Unit Work at Xerox's Webster Facility

JLL provides real estate facility services for Xerox at locations in the United States and Canada, including real estate brokerage transactions, private management, facilities management, and maintenance (Tr. 8, 47). The most recent contract between Xerox and JLL is effective as of November 1, 2012 (Tr. 47; GC Exh. 3). As of November 18, 2014, JLL was to begin providing services for Xerox at its Webster, New York facility, including HVAC maintenance, cleaning, moving, docks, and ancillary services (Tr. 48–49). Pursuant to the contract between Xerox and JLL, the scope of the work to be performed will remain under the control of Xerox (Tr. 49; GC Exh. 3, arts. 3.7, 4.6). Some of the services provided by JLL would have been previously performed by bargaining unit employees, and some would not (Tr. 49).

On July 24, 2014,[2] Kelly and Nappi met with LaDue at Xerox's labor relations office, and informed LaDue that Xerox intended to subcontract certain facilities work to JLL (Tr. 20, 50). Kelly and Nappi described the work to be subcontracted as site and facilities work, custodial work, and some maintenance and utility work (Tr. 21). LaDue took the position at this meeting that subcontracting of the maintenance work would violate article II(B) of the collective-bargaining agreement (Tr. 21, 50–51, 55–56). Kelly and Nappi testified that LaDue did not mention article XXII of the contract (Tr. 21, 52).

On July 28, Kelly and Nappi met with Bonadonna and LaDue at the Joint Board's offices in Rochester to again discuss the subcontracting issue (Tr. 21–22). During this meeting, Kelly and Nappi identified the bargaining unit job classifications whose work would be subcontracted, such as the L-45 utility workers which were part of site and facilities, and the corporate riggers, custodial group, and maintenance (Tr. 22, 51). Kelly and Nappi stated that the subcontracting would take effect in the 4th quarter of the year, around November (Tr. 22). At this meeting, Bonadonna stated that the proposed subcontracting would violate article II(B) of the contract, particularly with respect to the maintenance classifications, and LaDue stated that after Xerox announced the subcontracting the Joint Board would file a grievance alleging that it violated article II(B)(5) (Tr. 22, 51–52, 55–56). However, Kelly testified that neither Bonadonna nor LaDue took the position that the proposed subcontracting would violate article XXII, or mentioned that provision (Tr. 22–23).

On August 7, Kelly received two letters by email from Bonadonna's administrative assistant, discussing the possible applicability of article XXII to the impending subcontracting of bargaining unit work at the Webster facility (Tr. 24–25; GC Exh. 2). These letters, from Union Attorney Michael T. Harren to Bonadonna, posited that article XXII provided a potential basis for contending that the subcontracting of Xerox's maintenance operations in Monroe County violated the collective-bargaining agreement, and discussed article XXII's history and purpose (GC Exh. 2).[3]

On August 21, the Joint Board filed three grievances.[4] The first grievance alleged that Xerox violated article XXII by transferring "operational control over the maintenance functions at the Corporation's Monroe County facilities" without complying with Article XXII (GC Exh. 3(a)). The second and third grievances alleged that Xerox violated Article II(B)(5) by

[2] All subsequent dates are in 2014, unless otherwise indicated.

[3] The evidence establishes that the Joint Board had never previously asserted that art. XXII applied to subcontracting situations (Tr. 43-45).

[4] On August 12, Xerox and the Joint Board reached an agreement providing that the approximately 67 skilled trades employees would remain employees of Xerox, leaving 59 bargaining unit employees to be laid off (Tr. 23–24).

subcontracting L-7 lubrication work and L-45 work involving the changing of filters, in that both of these functions constituted "coverage work" exempt from outsourcing or subcontracting pursuant to that provision (GC Exhs. 3(b), (c)). On August 26, the Joint Board filed a fourth grievance, contending that the J-27 air tool repair positions also constituted "coverage work" exempt from subcontracting under article II(B)(5) (GC Exh. 3(d)). The complaint does not allege that the grievances involving violations of article II(B)(5) were unlawful pursuant to Section 8(e) or 8(b)(4) of the Act.

On September 3, Kelly and Joe Calabria, who was then Xerox's site and facilities operations manager, met with LaDue regarding the four subcontracting grievances (Tr. 25–26). According to Kelly, during this meeting, LaDue stated that the Joint Board took the position that the subcontracting of site facilities work would trigger article XXII of the collective-bargaining agreement (Tr. 27). As a result, Xerox needed to provide 60 days' notice to the Joint Board's regional manager, and the Joint Board wanted a written assurance from JLL that JLL would honor the collective-bargaining agreement (Tr. 27). When Kelly asked LaDue for a more specific statement regarding article XXII's applicability, LaDue stated that he himself did not fully understand the provision, as it involved "a lot of legal jargon." (Tr. 27, 100).

On October 27, the Joint Board initiated a civil action and filed a motion for a preliminary injunction in Case No. 6:14-CV-6607 in the United States District Court for the Western District of New York, seeking to enjoin Xerox from subcontracting the maintenance and other functions at its Monroe County facilities until the Joint Board's grievance alleging that the subcontracting violates article XXII was arbitrated (Jt. Exh. 5).

III. ANALYSIS AND CONCLUSIONS

A. Contentions of the Parties

The General Counsel and Xerox contend that article XXII of Xerox's collective-bargaining agreement with the Joint Board violates Section 8(e) on its face, because it is an unambiguous provision having the effect of an impermissible union signatory clause. The General Counsel and Xerox further argue that article XXII is not a valid work-preservation clause, and that even if the provision were ambiguous the extrinsic evidence in the record indicates that the Joint Board sought to interpret or apply it in an unlawful manner. Finally, the General Counsel and Xerox contend that the Joint Board violated Section 8(b)(4)(ii)(A) by attempting to enforce the unlawful provision through the grievance procedure and Federal litigation, and violated Section 8(b)(4)(ii)(B) by threatening, coercing, and restraining Xerox with the object of forcing Xerox to cease doing business with JLL.

The Joint Board contends that article XXII is a valid work-preservation provision under *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612 (1967), and subsequent cases. Specifically, the Joint Board argues that the evidence establishes that its objective in entering into article XXII was the preservation of work performed by bargaining unit employees, and that Xerox, the contracting employer, has the power to assign the work subcontracted to JLL. *NLRB v. International Longshoremen's Assn.*, 447 U.S. 490, 504 (1980). As a result, the Joint Board contends that the cComplaint must be dismissed on that basis. The Joint Board further argues that, to the extent that an analysis of article XXII's validity under Section 8(e) is appropriate, the clause is ambiguous, and should therefore be interpreted as to require only what is lawful under established Board principles of construction. Finally, the Joint Board argues that within the context of the Section 8(e) analysis, article XXII is more appropriately considered a successor clause addressing sales and transfers of ownership, and is therefore not unlawful.

B. Article XXII of the Collective-Bargaining Agreement Violates Section 8(e)

Section 8(e) of the Act states as follows:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void.[5]

In order to determine whether particular contract language violates Section 8(e), the Board evaluates whether the union's objective was the "preservation of work" for bargaining unit employees, or whether the agreement is "tactically calculated to satisfy union objectives elsewhere." *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 644 (1967); see also *Hotel & Restaurant Employees Local 274 (Sheraton University Hotel)*, 326 NLRB 1058 (1998); *Chicago Dining Room Employees Local 42 (Gaslight Club)*, 248 NLRB 604, 606 (1980). As the Supreme Court has stated, "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-à-vis his own employees." *National Woodwork Mfrs. Assn.,* 386 U.S. at 645. In *NLRB v. International Longshoremen's Assn.*, 473 U.S. 61, 76 (1985), the Court reiterated its analysis for determining whether contested language constituted a lawful work-preservation agreement as follows:

> First, it must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give the employees the work in question – the so-called "right of control" test…The rationale of the second test is that if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever does have such power over the work.

NLRB v. International Longshoremen's Assn., 447 U.S. at 504-505; see also *Painters District Council 51 (Manganaro Corp., Maryland)*, 321 NLRB 158, 164 (1996).

The Board has also developed the following analytical

[5] There are provisos to Sec. 8(e) which apply in the construction and garment industries, neither of which are pertinent here.

framework for evaluating language which allegedly violates Section 8(e):

> [I]f the meaning of the clause is clear, the Board will determine forthwith its validity under 8(e); where the clause is not clearly unlawful on its face, the Board will interpret it to require no more than what is allowed by law. On the other hand, if the clause is ambiguous, the Board will not presume unlawfulness, but will consider extrinsic evidence to determine whether the clause was intended to be administered in a lawful or unlawful manner. In the absence of such evidence, the Board will refuse to pass on the validity of the clause.

Teamsters Local 982 (J. K. Barker Trucking Co.), 181 NLRB 515, 517 (1970), enfd. 450 F.2d 1322 (D.C. Cir. 1971); see also *Painters District Council 51 (Manganaro Corp., Maryland)*, 321 NLRB at 161, 164.

Applying these general principles, the Board has long held that contract language "which purports to limit leasing or subcontracting to employers who are signatories to union contracts," termed a "union signatory clause," violates Section 8(e). *Chicago Dining Room Employees Local 42 (Gaslight Club)*, 248 NLRB at 606; *Hotel & Restaurant Employees Local 531 (Verdugo Hills Bowl)*, 237 NLRB 1204, 1206 (1978), enfd. 623 F.2d 61 (9th Cir. 1980); see also *Teamsters Local 251 (Material Sand & Stone Corp.)*, 356 NLRB No. 135, slip op. at 2–3 (2011), enf. denied in part 691 F.3d 49 (1st Cir. 2012); *Carpenters Local 623 (Atlantic Exposition Services)*, 335 NLRB 586, 589 (2001), enfd. 320 F.3d 385 (3d Cir. 2003). The Board has consistently held that union signatory provisions seek "to regulate the labor policies of other employers" and thus further "general union objectives," as opposed to protecting the job opportunities of bargaining unit employees. *Chicago Dining Room Employees Local 42 (Gaslight Club)*, 248 NLRB at 606; see also *Teamsters Local 251 (Material Sand & Stone Corp.)*, 356 NLRB No. 135, slip op. at 2-3; *Carpenters Local 623 (Atlantic Exposition Services)*, 335 NLRB at 589. Such clauses therefore have a secondary objective, and violate Section 8(e). Id.

The Board's analysis in this respect distinguishes union signatory clauses directed to subcontracting, leases and concessions from clauses addressing the sale or transfer of an enterprise. The Board has reasoned that subcontracting, leasing, and concessions involve an ongoing business relationship, or one entity's "doing business" with another within the meaning of Section 8(e). Purchases and transfers, by contrast, involve a permanent transfer or substitution of one entity for another, and are not considered business transactions. *Hotel & Restaurant Employees Local 274 (Sheraton University Hotel)*, 326 NLRB at 1058, 1059; *Hotel & Restaurant Employees Local 531 (Verdugo Hills Bowl)*, 237 NLRB at 1207. The Board has determined that union signatory clauses applicable to leasing or subcontracting are not designed to protect bargaining unit employees, but seek to advance "general union objectives" and "to regulate the labor policies of other employers." *Chicago Dining Room Employees Local 42 (Gaslight Club)*, 248 NLRB at 606; *Hotel & Restaurant Employees Local 531 (Verdugo Hills Bowl)*, 237 NLRB at 1206. Thus, clauses which explicitly limit leasing or subcontracting to signatory employers, or which have that effect, are facially invalid under Section 8(e). *Hotel & Restaurant Employees Local 274 (Sheraton University Hotel)*, 326 NLRB at 1058–1059; *Chicago Dining Room Employees Local 42 (Gaslight Club)*, 248 NLRB at 607; *Hotel & Restaurant Employees Local 531 (Verdugo Hills Bowl)*, 237 NLRB at 1207.

Article XXII of the parties' collective-bargaining agreement violates Section 8(e) on its face under the foregoing case law. Article XXII prohibits the leasing of Xerox's production functions or facilities in Monroe County unless the lessee makes a "binding written commitment . . . to assume all of the Company's obligations under this Agreement." This language is similar to language found by the Board in previous cases to create an unlawful union signatory clause under Section 8(e). *Hotel & Restaurant Employees Local 274 (Sheraton University Hotel)*, 326 NLRB at 1058–1059 (provision stating that the collective-bargaining agreement "shall be applicable to and binding upon any successor, assignee, lessee or concessionaire of the Employer" had the effect of an unlawful union signatory clause); *Chicago Dining Room Employees Local 42 (Gaslight Club)*, 248 NLRB at 607 (unlawful clause required that any "purchaser-lessee" with employees performing bargaining unit work "shall as a condition precedent to such transaction execute this Agreement"); *Hotel & Restaurant Employees Local 531 (Verdugo Hills Bowl)*, 237 NLRB at 1207 (clause which provided that the collective-bargaining agreement "shall be applicable to and binding upon" any "lessee or subcontractor" which "utilizes the services of employees performing work covered by this agreement" prohibited under Section 8(e)). Like the clauses at issue in those cases, article XXII has the effect of prohibiting Xerox from doing business with any potential lessee which refuses to be bound by the collective-bargaining agreement, and therefore has the effect of a union signatory clause.

As discussed above, Respondent contends that the case law requires an initial determination as to whether article XXII is a work-preservation provision by evaluating whether the clause has "as its objective the preservation of work traditionally performed by employees represented by the union" and whether the contracting employer has "the power to give the employees the work in question."[6] Respondent argues that an analysis as to whether article XXII violates Section 8(e) is only appropriate if evidence establishes that article XXII does not have a legitimate work-preservation objective. However, the cases discussed above apply a body of law developed by the Board to determine whether clauses specifically addressing successorship and subcontracting violate Section 8(e) or constitute legitimate work preservation provisions. *Hotel & Restaurant Employees Local 274 (Sheraton University Hotel)*, 326 NLRB at 1058–1059; *Chicago Dining Room Employees Local 42 (Gaslight Club)*, 248 NLRB at 606-607; *Hotel & Restaurant Employees Local 531 (Verdugo Hills Bowl)*, 237 NLRB at 1206-1207.[7] Furthermore, the Supreme Court cases relied upon

[6] Respondent argues that the evidence satisfies both of these criteria, and as a result art. XXII is a legitimate work-preservation provision.

[7] In particular, *Hotel & Restaurant Employees Local 274 (Sheraton University Hotel)*, decided long after the Supreme Court's *NLRB v. International Longshoremen's Assn.* opinion, determined that the pro-

by Respondent in this respect involved contract provisions which addressed completely different subjects. See *National Woodwork Mfrs. Assn.,* 386 U.S. at 616 fn. 2 (work rule prohibiting union carpenters on jobsites from handling prefitted or cut-out doors alleged to violate Section 8(e)); *NLRB v. International Longshoremen's Assn.*, 447 U.S. at 497–499 (allegedly unlawful work rule required that containers which would otherwise be loaded or unloaded within the local port area be loaded or unloaded by longshoremen at the pier); *NLRB v. International Longshoremen's Assn.*, 473 U.S. at 64–66 (same). By contrast, Article XXII addresses successorship, leases and, as Respondent seeks to apply it here, subcontracting.

In any event, I find that given the applicable case law article XXII is not a valid work-preservation clause under *National Woodwork Mfrs. Assn.* Valid work-preservation clauses addressing subcontracting are generally limited to requiring that the employer to which the work is subcontracted provide its employees with wages and benefits commensurable with those required pursuant to the collective-bargaining agreement. See *Blyer v. Staten Island Cable LLC*, 261 F.Supp.2d 168, 172 (2003) (union standards clauses which "limit subcontracting to those companies whose terms and conditions match[] the economic terms and conditions" of the parties' collective-bargaining agreement permissible under Section 8(e)); *NLRB v. Hotel & Restaurant Employees Local 531*, 623 F.2d 61, 67 (1980) (permissible work preservation or area standards clauses "prohibit an employer from subcontracting work normally performed by union employees to any employer who pays his employees less than union wages," thus causing primary pressure only). By contrast, as discussed above, clauses which require that the employer to which the work is subcontracted assume the entire collective-bargaining agreement, including the union security provision, constitute union signatory clauses prohibited under Section 8(e). Here, article XXII makes no mention of wage rates, job security, or other specific terms and conditions of employment pertaining to the bargaining unit, nor does it make any mention of the bargaining unit employees. It simply requires that any purchaser, lessee, or entity assuming "ownership of or operational control over a significant portion of the Company's current production functions or facilities in Monroe County, New York," also assume the collective-bargaining agreement. *Chicago Dining Room Employees Local 42 (Gaslight Club)*, 248 NLRB at 607 (clause which did not "in any way limit its effect to the preservation of the jobs of any unit employees" and required the lessee to assume the contract "regardless of whether or not those unit employees lose their jobs" exceeded "the legitimate primary purpose of protecting unit work").

I note that where such language does discuss the bargaining unit employees or conditions more characteristic of successorship by purchase or transfer, the Board has in some cases found it to be ambiguous. In *Liquid Carbonic Corp.*, 277 NLRB 851 (1985), the Board, overruling the ALJ, held that a clause having a possible union signatory effect in the subcontracting context was ambiguous, and did not violate Section 8(e). The language at issue in that case required that if the employer sought to "discontinue using his trucks the Employer must arrange for his Employees to be employed by whoever does the pick-up or delivery," and that "the provision of this entire contract must be agreed to by whoever takes over the operation." *Liquid Carbonic Corp.*, 277 NLRB at 851. The Board found that this language did not violate Section 8(e) on its face, and thus interpreted it "to require no more than what is allowed by law." *Liquid Carbonic Corp.*, 277 NLRB at 851, citing *Teamsters Local 982 (J.K. Barker Trucking)*, 181 NLRB at 517. However, in that case, the clause also required that the bargaining unit drivers' employment continue with the entity taking over the pick-up or delivery aspect of the contracting employer's operation. *Liquid Carbonic Corp.*, 277 NLRB at 851; see *Teamsters Local 277 (J & J Farms Creamery)*, 335 NLRB 1031, 1032-1033 (2001) (Member Liebman, dissenting). In addition, the language at issue in *Liquid Carbonic Corp.* did not explicitly apply to lessees or concessionaires, and required a complete discontinuance of the use of the bargaining unit employees' equipment. Id; see also *Teamsters Local 277 (J & J Farms Creamery)*, 335 NLRB at 1032 fn. 3 (noting that the contract provision in *Liquid Carbonic Corp.* "did not limit subcontracting to union signatories, in the first instance"). The contract provision in that case could thus more arguably be limited to a purchase or sale. Finally, despite the Board's decision in *Liquid Carbonic Corp.*, other clauses which specifically refer to bargaining unit employees and their work were nevertheless found to be or have the effect of unlawful union signatory provisions under Section 8(e). See *Chicago Dining Room Employees Local 42 (Gaslight Club)*, 248 NLRB at 605 (contract provision required purchaser, lessee, or transferee to execute contract only in the event that they "employ[] employees working in job classifications covered by this Agreement"); *Hotel & Restaurant Employees Local 531 (Verdugo Hills Bowl)*, 237 NLRB at 1204–1205 (clause provided that contract was binding on a lessee or subcontractor that "utilizes the services of employees performing work covered by this Agreement").

Given my conclusion that article XXII is unambiguous and facially invalid, evidence of the parties' intent in negotiating and enforcing it is irrelevant. *Hotel & Restaurant Employees Local 274 (Sheraton University Hotel)*, 326 NLRB at 1059. However, the extrinsic evidence presented by the Joint Board here indicates that the parties intended article XXII to operate as a union signatory clause, as opposed to union standards or work- preservation provision. Bonadonna was shop chair and attended the 1989 negotiations where article XXII was first negotiated (Tr. 125). He testified that Union Demand 1(h), article XXII's precursor during the negotiations, required "Adherence to all provisions of the current labor agreement" from any new owner of Xerox or a significant portion of the company (Tr. 133). Bonadonna also testified that when describing their agreement regarding article XXII during negotiations, the parties stated that "whoever bought the company would have to

vision in question had the effect of an unlawful union signatory clause without any mention of the two-component work-preservation analysis from that Supreme Court case, which the Joint Board contends is controlling here. 326 NLRB at 1058-1059

honor the contract provision, provisions" (Tr. 141).[8] Bargaining notes refer to the proposal as a "successorship clause" (R.S. Exh. 3(g), p. 344–345; see also GC Exh. 2). A Joint Board newsletter describing the tentative agreement following the 1989 negotiations describes article XXII as "a guarantee that the new contract will be honored even if Xerox were to be sold" (CP. Exh. 1, p. 3). It is true that in the notes of the 1989 negotiations, the Union's negotiator states that the purpose of article XXII was to protect the bargaining unit employees and their jobs (R.S. Exh. 3(b), p. 38, Exh. 3(g), p. 344-345). The Joint Board was perfectly entitled to accomplish this objective through a successorship provision applicable in the context of sales or transfers of Xerox's business. However, given the case law distinguishing in the context of successorship and union signatory clauses between purchases or transfers and leasing or subcontracting, the inclusion of leasing in article XXII removed the clause from the purview of a legitimate work-preservation provision, causing it to run afoul of Section 8(e).[9]

Finally, the Joint Board's Post-Hearing brief refers to *Teamsters Local 814 (Bader Brothers Warehouses)*, 225 NLRB 609 (1976), arguing that the General Counsel's contentions here contradict the Board's decision in that case. I disagree. In that case, which preceded the Board's decisions in *Hotel & Restaurant Employees Local 274 (Sheraton University Hotel)*, *Chicago Dining Room Employees Local 42 (Gaslight Club)*, and *Hotel & Restaurant Employees Local 531 (Verdugo Hills Bowl)*, the Board affirmed the ALJ's conclusion that a clause containing the following language did not violate Section 8(e) in the context of a sale of the Employer's assets and lease of its premises:

> In the event an entire operation or part thereof, is sold, leased, transferred or taken over by sale, transfer, lease assignment, receivership, or bankruptcy proceeding, such operation or part of an operation shall continue to be subject to the terms and conditions of this Agreement during the term hereof…In the event the Employer fails to require the purchaser, transferee or lessee to assume the obligations of this Agreement, the Employer shall be liable to the Union, and to the employees covered, for all damages sustained as a result of such failure to require assumption of the terms of this Agreement; but shall not be liable after the purchaser, transferee or lessee has agreed in writing to assume the obligation of this Agreement.

Teamsters Local 814 (Bader Brothers Warehouses), 225 NLRB at 610–612. The Board in its decision concurred with the gravamen of the ALJ's analysis of two previous cases involving maritime shipping, which the ALJ distinguished to ultimately conclude that the disputed provision did not violate Section 8(e). *Teamsters Local 814 (Bader Brothers Warehouses)*, 225 NLRB at 609 fn. 2. However, the Board also referred to its decision in *Machinists District No. 71 (Harris Truck & Trailer Sales, Inc.)*, 224 NLRB 100 (1976), holding that "the sale of assets in liquidation" did not constitute "doing business" within the meaning of Section 8(e), which issued between the ALJ's decision in *Teamsters Local 814 (Bader Brothers Warehouses),* and its own. *Teamsters Local 814 (Bader Brothers Warehouses)*, 225 NLRB at 609 fn. 1. The Board found that its holding in *Machinists District No. 71 (Harris Truck & Trailer Sales, Inc.),* provided "an alternative basis" for the ALJ's ultimate determination in *Teamsters Local 814 (Bader Brothers Warehouses)*. Id. Indeed, subsequently *Teamsters Local 814 (Bader Brothers Warehouses),* has been cited primarily for the proposition that a sale or purchase does not constitute "doing business" within the meaning of Section 8(e). See *Liquid Carbonic Corp.*, 277 NLRB at 861; *Heartland Industrial Partners, LLC*, 348 NLRB 1081, 1091 (2006), petition for review dismissed 265 Fed. Appx. 1 (D.C. Cir. 2008). In any event, I find the line of cases cited by the General Counsel and Xerox – *Hotel & Restaurant Employees Local 274 (Sheraton University Hotel)*, *Chicago Dining Room Employees Local 42 (Gaslight Club),* and *Hotel & Restaurant Employees Local 531 (Verdugo Hills Bowl)*—more authoritative given their consistent analysis and more recent provenance. As a result, I find that *Teamsters Local 814 (Bader Brothers Warehouses),* does not contradict the contention of the General Counsel and Xerox that union signatory agreements, such as article XXII here, violate Section 8(e) in context of subcontracting, as opposed to a purchase or transfer of assets.

For all of the foregoing reasons, I find that article XXII of the collective-bargaining agreement between the Joint Board and Xerox violates Section 8(e) of the Act.

C. The Joint Board's Alleged Attempts to Enforce Article XXII

The complaint alleges that the Joint Board violated Section 8(b)(4)(ii)(A) and (B) when LaDue demanded written assurances that JLL would assume Xerox's obligations under the collective-bargaining agreement during the parties' meeting on September 3. Because I find that under the relevant case law LaDue's comments during the September 3 meeting did not threaten, coerce, or restrain Xerox, I conclude that the General Counsel has not substantiated this allegation, and recommend that it be dismissed.[10]

[8] The Joint Board also argues that because the parties understood that Union Demand 1(c) could not apply to a recently purchased subsidiary of Xerox, they did not intend to apply contract language beyond that which was legally permissible or feasible (R. S. Exh. 5). However, Union Demand 1(c) extends the Joint Board's jurisdiction to employees in the vicinity of Monroe County, and is not a successorship clause or a precursor to art. XXII. In addition, the fact remains that the Joint Board did, through its statements and its grievance and lawsuit, seek to apply art. XXII to leasing or subcontracting—beyond the permissible scope of a union signatory provision under the relevant case law.

[9] I also note that the evidence establishes that the Joint Board had never before invoked art. XXII in the context of subcontracting. Furthermore, it is undisputed that a purchaser, lessee, or transferee of Xerox would have found it impossible to reproduce all of the terms and conditions of employment enjoyed by bargaining unit employees under the collective-bargaining agreement, because its employees would not have been able to continue to participate in Xerox's self-insured pension and health benefits plans. This state of affairs casts doubt on the Joint Board's contention that art. XXII was intended solely to ensure that a purchaser, lessee, or transferee provided its employees performing bargaining unit work with terms and conditions of employment commensurate with those provided for under the contract.

[10] The complaint also alleges that the Joint Board violated Section 8(b)(4)(ii)(A) and (B) on July 24 and 28 when LaDue and Bonadonna, respectively, told Xerox that subcontracting was prohibited by Article

Section 8(b)(4)(ii)(A) prohibits labor organizations from threatening, coercing, or restraining any person engaged in commerce with the object of "forcing or requiring any employer…to enter into any agreement which is prohibited by Section 8(e)." Section 8(b)(4)(ii)(B) prohibits labor organizations from threatening, coercing, or restraining persons engaged in commerce with the object of "forcing or requiring any person . . . to cease doing business with any other person."

I find that LaDue's remarks at the September 3 meeting did not threaten, coerce, or restrain Xerox within the meaning of Section 8(b)(4)(ii)(A) and (B). During this meeting, LaDue told Kelly and Calabria that the Joint Board took the position that subcontracting of site facilities work would trigger Article XXII. LaDue stated that Xerox was therefore required to provide 60 days' written notice of the subcontracting to the Joint Board, and that the Joint Board wanted written assurances from JLL that JLL would honor the collective-bargaining agreement. LaDue's statement would thus constitute a reaffirmation of Article XXII, in violation of Section 8(e). See, e.g., *Teamsters Local 251 (Material Sand & Stone Corp.)*, 356 NLRB No. 135, slip op. at 2–3; *Time Warner Cable of New York City*, 344 NLRB 361, 364 (2005); *Laborers Local 29 (RWKS Comstock)*, 344 NLRB 751, 754–755 (2005).

By contrast, there is no precedent for finding that a union's statement seeking compliance with a contract provision which violates Section 8(e), unaccompanied by threats of legal or economic action, constitutes a threat, restraint, or coercion within the meaning of Section 8(b)(4)(ii)(A) and (B). The cases finding Section 8(b)(4)(ii)(A) and (B) violations in connection with a contract provision violating Section 8(e) involve definite statements that the union will take some sort of action, such as picketing or other direct action involving the employer's business, if the employer does not comply with the unlawful contract language. In cases such as *Sheet Metal Workers Local 27 (AeroSonics, Inc.)* and *Hotel & Restaurant Employees Local 531 (Verdugo Hills Bowl)*, cited by the General Counsel, the union threatened to take economic action such as picketing or refusing to handle products or work, if the employer failed to comply with a contract provision violating Section 8(e). *Sheet Metal Workers Local 27 (AeroSonics, Inc.)*, 321 NLRB 540, 547–548 (1996) (union threatened to have its members refuse to handle products manufactured by entities with whom the union had a labor dispute unless the employer complied with an award unlawfully interpreting a facially valid subcontracting clause); *Hotel & Restaurant Employees Local 531 (Verdugo Hills Bowl)*, 237 NLRB at 1207 (union threatened to strike employer if employer's lessee did not assume collective-bargaining agreement pursuant to unlawful union signatory clause).

LaDue's statements at the September 3 meeting, however, merely sought to enforce the contract provision, without portending economic or legal action if Xerox refused to comply. All of the evidence here indicates that Xerox and the Joint Board entered into article XXII voluntarily in 1989. Thus, there is no evidence of restraint and coercion above and beyond from the contract provision, voluntarily agreed upon, which violated Section 8(e). See *Longshoremen Local 1410 (E. Harris Mercer)*, 235 NLRB 172, 180 (1978) (Section 8(b)(4)(ii)(A) "requires independent proof that the employer party was restrained and coerced" in addition to the parties' having entered into a clause violating Section 8(e) "of their own free will"). Nor does the evidence regarding LaDue's statements at the September 3 meeting rise to the level of restraint and coercion under Section 8(b)(4)(ii)(B). *Longshoremen Local 1410 (E. Harris Mercer)*, 235 NLRB at 180–181. Instead of threatening economic or legal action, LaDue was arguing that Xerox should comply with contract language to which it had voluntarily agreed. While his remarks may have constituted a reaffirmation of the contractual provision which violated Section 8(e), they did not entail restraint and coercion over and above what the parties had already voluntarily agreed upon. The General Counsel does not cite any authority to support a specific contention that LaDue's statement that Xerox's subcontracting violated article XXII of the collective-bargaining agreement, and his demand for written assurances that JLL would apply the contract, violated Section 8(b)(4)(ii)(A) and (B).[11] As a result, I decline to find that LaDue's statements at the September 3 meeting violated Section 8(b)(4)(ii)(A) and (B), and will recommend that these allegations be dismissed.

Finally, the complaint alleges that the Joint Board violated Section 8(b)(4)(ii)(A) and (B) by filing and processing a grievance alleging that Xerox violated article XXII, and by filing a lawsuit in Federal district court seeking to enjoin Xerox from subcontracting with JLL and to compel arbitration. I find that by filing the August 21 grievance alleging that Xerox's failure to comply with Article XXII prior to subcontracting violated the collective-bargaining agreement, the Joint Board violated Section 8(b)(4)(ii)(A) and (B) of the Act. *Newspapers & Mail Deliverers (New York Post)*, 337 NLRB 608 (2002); see also *Elevator Constructors (Long Elevator)*, 289 NLRB 1095, 1095–1096 (1988) (union violated Section 8(b)(4)(ii)(A) by filing a grievance based on an interpretation of the contract "that would convert it into a de facto hot cargo provision," in violation of Section 8(e)); *Sheet Metal Workers Local 27 (AeroSonics, Inc.)*, 321 NLRB at 540 fn. 2, 548 (grievance with a "cease doing business" objective violated Section 8(b)(4)(ii)(B)). The Joint Board's initiation of civil action 6:14-CV-6607 and motion for a preliminary injunction on October 27 in order to enjoin Xerox's subcontracting prior to the arbitration of the grievance likewise violates Section 8(b)(4)(ii)(A) and (B). *Sheet Metal Workers Local 27 (AeroSonics, Inc.)*, 321 NLRB at 548.

For all of the foregoing reasons, the evidence establishes that the Joint Board violated Section 8(b)(4)(ii)(A) and (B) by filing its August 21 grievance alleging that Xerox failed to comply

XXII. There is no evidence that LaDue and Bonadonna made such statements; as a matter of fact, Kelly testified that LaDue and Bonadonna did not even mention art. XXII at the July 24 and 28 meetings. As a result, I recommend that pars. VIII(b) and (c) of the complaint be dismissed.

[11] Xerox does not argue that LaDue's statements at the September 3 meeting violated Section 8(b)(4)(ii)(A) and (B), but only contends that the Joint Board's grievance and lawsuit were unlawful. Posthearing brief for Charging Party at 17–18.

with Article XXII, and by initiating a civil action on October 27 to enjoin Xerox's subcontracting prior to the grievance's arbitration. I recommend that the complaint's allegations that LaDue's statements at the September 3 meeting violated Section 8(b)(4)(ii)(A) and (B) be dismissed.

CONCLUSIONS OF LAW

1. Xerox Corporation and Jones Lang LaSalle Americas, Inc. are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Rochester Regional Joint Board Local 14A is a labor organization within the meaning of Section 2(5) of the Act.

3. By entering into article XXII of its collective-bargaining agreement with Xerox Corp., Rochester Regional Joint Board Local 14A, violated Section 8(e) of the Act.

4. By filing a grievance to enforce article XXII on August 21, 2014, and by filing a civil action and a motion for a preliminary injunction in the United States District Court for the Western District of New York on October 27, 2014, seeking to enjoin Xerox Corp. from subcontracting until the August 21, 2014 grievance was arbitrated, the Joint Board violated Section 8(b)(4)(ii)(A) of the Act.

5. By filing a grievance to enforce article XXII on August 21, 2014, and by filing a civil action and a motion for a preliminary injunction in the United States District Court for the Western District of New York on October 27, 2014, seeking to enjoin Xerox Corp. from subcontracting until the August 21, 2014 grievance was arbitrated, with the objective of precluding Xerox Corp. from doing business with Jones Lang LaSalle Americas, Inc., the Joint Board violated Section 8(b)(4)(ii)(B) of the Act.

6. The Joint Board has not violated the Act in any other manner.

THE REMEDY

Having found that the Joint Board has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action necessary to effectuate the policies of the Act.

Having found that article XXII of the collective-bargaining agreement violates Section 8(e) of the Act as applied to "leases" as specified in paragraph A(1), I shall recommend that the Joint Board be ordered to cease enforcing only that portion of article XXII which requires that a lessee or concessionaire be bound by the agreement, as suggested by the General Counsel. *Teamsters Local 291 (Lone Star Industries)*, 291 NLRB 581 (1988).

Having found that the Joint Board violated the Act by filing a grievance alleging that Xerox violated article XXII by its subcontracting to JLL, and by filing a civil action in Federal district court to enjoin Xerox's subcontracting until the grievance can be arbitrated, I shall recommend that the Joint Board be ordered to withdraw its September 21, 2014 grievance alleging that article XXII was violated. As the object of the Joint Board's grievance was unlawful, I shall further recommend that the Joint Board be required to seek dismissal of its action 6:14-CV-6607 in the United States District Court for the Western District of New York attempting to enjoin Xerox from subcontracting until the grievance is arbitrated.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER

The Respondent, Rochester Regional Joint Board Local 14A, Rochester, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Entering into, maintaining, enforcing, or giving effect to those portions of article XXII of its collective-bargaining agreement with Xerox Corp. which require that any lessee or concessionaire assume the collective-bargaining agreement.

(b) Pursuing its September 21, 2014 grievance alleging that Xerox Corp. violated article XXII of the collective-bargaining agreement in connection with its subcontracting to Jones Lang LaSalle Americas, Inc.

(c)Pursuing civil action 6:14-CV-6607 filed on October 27, 2014, in the United States District Court for the Western District of New York seeking a preliminary injunction enjoining Xerox Corp. from subcontracting to Jones Lang LaSalle Americas, Inc. until the September 21, 2014 grievance is heard.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw the September 21, 2014 grievance alleging that Xerox Corp.'s subcontracting to Jones Lang LaSalle Americas, Inc. violated article XXII of the collective-bargaining agreement, and notify Xerox that the grievance has been withdrawn.

(b) Seek dismissal of civil action 6:14-CV-6607 in the United States District Court for the Western District of New York filed on October 27, 2014, and motion for a preliminary injunction to enjoin Xerox Corp. from subcontracting to Jones Lang LaSalle Americas, Inc. until the September 21, 2014 grievance is arbitrated.

(c) Within 14 days after service by the Region, post at its Rochester, New York office copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Joint Board to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Xerox Corp. has gone out of business or closed the facility involved in these proceedings, the Joint Board shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Xerox Corp. at any time since July 1, 2014.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated: Washington, DC April 28, 2015

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT enter into, maintain, enforce, or give effect to those portions of article XXII of our collective-bargaining agreement with Xerox Corp. which require that any lessee or concessionaire assume the collective-bargaining agreement.

WE WILL NOT threaten, coerce or restrain Xerox Corp. by filing grievances, or initiating civil actions, where the object is to force or require Xerox Corp. to enter into an agreement which violates Section 8(e) of the Act.

WE WILL NOT threaten, coerce or restrain Xerox Corp. by filing grievances, or initiating civil actions, where an object thereof is to force Xerox Corp. to cease doing business with Jones Lang LaSalle Americas, Inc., or any other person.

WE WILL withdraw the September 21, 2014 grievance alleging that Xerox Corp.'s subcontracting to Jones Lang LaSalle Americas, Inc. violated article XXII of the collective-bargaining, and notify Xerox that the grievance has been withdrawn.

WE WILL seek dismissal of civil action 6L140CV-6607 in the United States District Court for the Western District of New York filed on October 27, 2014, and motion for a preliminary injunction to enjoin Xerox Corp. from subcontracting to Jones Lang LaSalle Americas, Inc. until the September 21, 2014 grievance is arbitrated.

ROCHESTER REGIONAL JOINT BOARD, LOCAL 14A

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/03-CC-137244 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.